MALAYAN BANKING BHD

v.

PK RAJAMANI & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-601-1999]
23 NOVEMBER 2002

LAND LAW: *Charge - Order for sale - Adjourned hearing of summons - Notice - Whether chargee's duty to serve notice of hearing on chargor - Failure to serve notice of adjourned hearing - Whether fatal - Whether order for sale nullified - Rules of the High Court 1980, O. 83 r. 2(4)*

The chargee in this case, in extracting the order for sale for the charged land, had not notified the chargor of the adjourned hearing of the summons as required by O. 83 r. 2(4) Rules of the High Court 1980. The chargor argued that such a lapse was fatal to the order for sale and, therefore, applied to declare the order a nullity. The application was allowed by the trial judge, ruling, upon the authority of *Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor*, that the failure to serve was indeed a nullity, and not a mere irregularity. Dissatisfied, the chargee appealed.

Held (dismissing the appeal and affirming the High Court)
Per Gopal Sri Ram JCA delivering the oral judgment of the court:

[1] The duty was upon the chargee to serve the notice of hearing of the summons as well as the notice of any adjourned hearing of the summons on the chargor. So here the duty laid upon the appellant/chargee. That duty, however, was never discharged. (p 83 a)

[2] The judge was entirely correct in applying *Muniandy*'s case. He had no choice as the fact pattern in that case resembled the facts before him. The principle was established by a court whose decision was plainly binding on him. (p 84 b)

[3] It was not correct to say that the order for sale was a mere irregularity and not a nullity. In all cases where service of process is not effected on a defendant, the courts have held any judgment or order which is the fruit of those proceedings to be a nullity. It does not matter what type of

proceedings they may be. Hence, the order for sale herein was void and the first respondent was entitled to have the same set aside *ex debito justitiae*. (pp 84 d & 85 d-e)

[4] Although the appeal was dismissed, the order of the learned judge as to damages (for both respondents) had to be set aside. (p 86 b-c)

[5] The legal position of the successful bidder, the second respondent, being so connected with the appellant's right to give good title, could not be in a better position than the appellant. If the order for sale was void then all that followed in its wake was equally void. The learned judge was therefore equally right in setting aside the order for sale against the second respondent. (pp 86 d-e & 87 g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Pemegang gadaian dalam kes ini, sewaktu mendapatkan perintah jualan terhadap tanah yang digadai, telah tidak memberitahu penggadai tentang tarikh pendengaran saman yang ditangguh sebagaimana yang dituntut oleh A. 83 k. 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980. Penggadai berhujah bahawa kegagalan untuk memberitahu adalah bermudarat kepada perintah jualan, dan dengan itu memohon untuk mengisytiharkan perintah tersebut sebagai batal. Permohonan telah diperkenankan oleh hakim bicara, yang memerintahkan, atas autoriti *Muniandy a/l Thamba Kaundan & Anor lwn. D & C Bank Bhd & Anor*, bahawa kegagalan memberitahu sememangnya telah mencetuskan suatu pembatalan, dan bukan hanya suatu ketidakteraturan. Tidak berpuas hati, penerima gadaian merayu.

Diputuskan (menolak rayuan dan mengesahkan Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman lisan mahkamah:

[1] Beban adalah atas penerima gadaian untuk menyerahkan notis pendengaran saman serta saman yang ditangguh kepada pemegang gadaian. Jadi beban di sini adalah terletak atas perayu. Tanggungjawab tersebut bagaimanapun tidak pernah disempurnakan.

[2] Hakim betul sepenuhnya apabila menggunapakai kes *Muniandy*. Beliau malah tidak mempunyai pilihan lain oleh kerana fakta kes tersebut menyerupai fakta kes yang berada di hadapannya. Prinsip telah pun diputuskan oleh mahkamah yang mana keputusannya mengikat beliau.

[3] Adalah tidak benar untuk mengatakan bahawa perintah jualan hanyalah suatu ketidakteraturan dan bukannya suatu pembatalan. Dalam semua kes di mana proses penyerahan tidak dibuat dengan sempurna ke atas defendan, mahkamah telah memutuskan bahawa apa jua perintah atau penghakiman

yang menyusul prosiding sedemikian adalah batal, tanpa mengira apakah bentuk prosiding tersebut. Yang demikian, perintah jualan di sini adalah tak sah dan responden pertama berhak mengetepikannya *ex debito justitiae.*

[4] Walaupun rayuan ditolak, perintah yang arif hakim berkenaan gantirugi (untuk kedua-dua responden) perlu diketepikan.

[5] Kedudukan undang-undang pembida yang berjaya, responden kedua di sini, adalah berkait rapat dengan hak perayu untuk memberi hak milik yang baik, dan kerana itu tidak boleh mengatasi kedudukan perayu sendiri. Jika perintah jualan tersebut tak sah, maka semua yang menyusulinya adalah juga tak sah. Yang arif hakim dengan itu juga betul apabila mengetepikan perintah jualan terhadap responden kedua.

Case(s) referred to:

Khor Cheng Wah v. Sungai Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Leow Boke Chooi v. Asia Motor Co Ltd [1967] 2 MLJ 109 ***(foll)***

M & J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 SC ***(foll)***

Muniandy Thamba Kaudan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 83 r. 2(4)

For the appellant/chargee - Neoh Poh Cheng (Jacqueline Chang); M/s Suhaimi Khor Zulkifli & Chang

For the 1st respondent - James Selva (GS Murtti); M/s Ong Kok Bin & Co

For the 2nd respondent - Balbir Singh; M/s Wan Balbir & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S6-31-1058-87]

Reported by Izatty Izzudin

JUDGMENT
(Oral)

Gopal Sri Ram JCA:

This is the judgment of the court.

This appeal is directed at the order of the High Court setting aside an order for sale obtained by the appellant at the adjourned hearing of the originating summons issued for the purpose of foreclosing upon the charge in its favour. Although a number of grounds have been advanced before us it is sufficient to deal with two of them.

The main ground of complaint is that the learned judge went wrong in holding that the order for sale which was obtained was a nullity because the first respondent had not been served with a notice of the adjourned hearing as required under O. 83 r. 2(4), Rules of the High Court 1980. Now the facts relevant to this ground of complaint may be shortly stated.

The first respondent is the registered proprietor of certain property. He created a charge over it in the appellant's favour to secure a loan granted to Sira Communications & General Contractors who was the borrower. Such a charge is known to the profession as the "third party charge". It is not like a guarantee. It is a proprietary transaction. When the borrower defaulted, the appellant took out proceedings to obtain an order for sale. The summons was duly served on the first respondent. There were some adjournments of the summons. At one of the adjourned hearings the first respondent was absent. The order for sale was then made. Later, in fact very much later; the first respondent took out an application to set aside the order for sale. His principal ground of complaint was that the notice of adjourned hearing was not served on him.

It is common ground – indeed it is indisputable – that the notice of adjourned hearing was never served on the first respondent. The learned judge held this to be fatal. The question is whether he was right. We think that he was.

In *Muniandy a/l Thamba Kaudan & Anor v. D & C Bank Bhd & Anor* [1996] 2 CLJ 586, a chargor who had failed to enter an appearance to a foreclosure summons had nevertheless attended court on its return date. The case was postponed and he did not appear on the adjourned date. It was established that the chargee had not served the notice of the adjourned hearing on the chargor. The Federal Court held the order for sale which had been obtained at the adjourned hearing in the absence of the chargor to be a nullity. Edgar Joseph Jr FCJ, a judge of great learning and eminence, dealt with the point of service (at p. 594 of the report) as follows:

> Counsel for the chargors had contended that neither of his clients had been served with notice of the adjourned hearing of the originating summons, when the ex parte orders had been made, and as a result, were absent, and that they were thereby deprived of the opportunity of being heard, contrary to the requirements of O. 83 r. 2(4) the RHC 1980.
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> Counsel for the chargees' answer to this point was that O. 83 r. 2(4) did not apply to the present case because the relief prayed for by the chargees in their originating summons did not include relief for delivery of possession or payment of moneys secured by the charge.
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> It was pointed out by counsel for the chargees that it was a prerequisite requirement of O. 83 r. 2(4), imposed by O. 83 r. 2(1), that the plaintiff must have begun a charge action by originating summons, claiming possession or

payment of moneys secured by a charge or both, and that the present case was not such a case. It was accordingly submitted that failure to serve the chargors, or either of them, with notice of the adjourned hearing of the originating summons did not vitiate the *ex parte* orders.

In my view, even if counsel for the chargees were correct in his description of the nature of the reliefs prayed for by the chargees in their originating summons – though, in point of fact, he was not – this would not have relieved the chargees of their duty to serve notice of the adjourned hearing of the originating summons on the chargors because I consider that O. 83 r. 2(4) has a common law content. In other words, in my view, O. 83 r. 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alterem partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O. 83 r. 2(4) did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem.*

We find the facts of the present case to be indistinguishable from those of *Muniandy a/l Thamba Kaudan & Anor v. D & C Bank Bhd & Anor*. That decision is plainly binding on us because of the doctrine of stare decisis. The principle established in that case is that the duty is upon the chargee to serve the notice of hearing of the summons as well as the notice of any adjourned hearing of the summons on the chargor. So here the duty lay upon the appellant. And that duty was never discharged.

Learned counsel for the appellant sought to distinguish *Muniandy*'s case on the ground that in the present instant notice had been sent by the court. It was also suggested in argument that because of the deeming clause in the annexure to the charge in the instant case, the learned judge had fallen into error. We must be forgiven if we are unable to understand this argument. If the notice was never served by the appellant, then as pointed out by our learned brother Abdul Kadir bin Sulaiman JCA in the course of argument, the deeming provision is utterly irrelevant. It has no application. Further, we are unable to see the relevance of the deeming provision and its applicability with the notice sent out by the court since that notice does not come within the scope of the deeming provision. In plain words, the deeming provision does not say that the notice sent by the court would be sufficient. Whether such a provision would survive the mandatory requirements of O. 83 r. 2(4) is a question to be decided in some other case. The critical point here is that contained in the question put by our learned brother Abdul Kadir bin Sulaiman JCA to counsel for the appellant during argument. It is whether any direction had been issued by the court dispensing with service as provided in the aforesaid rule of court. The appellant counsel's feeble answer to this most important question was to refer

us to the notice of hearing issued by the court. That notice needless to say was not a direction to the contrary. A direction to the contrary envisage by O. 83 r. 2(4) is a specific order by the court hearing the summons made on application by a chargee. Such directions are very rare because foreclosing courts are most alive to the fact that the consequence of their order is to deprive a person of his property.

In our judgment, the judge was entirely correct in applying *Muniandy*'s case. He had no choice in the matter. The fact pattern in that case resembled, as we already said, the facts before him. The principle was established by a court whose decision was plainly binding on him. We therefore agree with the learned judge's conclusion on this part of the case.

Learned counsel for the appellant then raised an alternative point. He sought to argue that the order for sale was a mere irregularity and not a nullity. We do not agree. In all cases where service of process was not effected on a defendant the courts had held any judgment or order which is the fruit of those proceedings to be a nullity. It does not matter what type of proceedings they may be. The result is always the same.

Thus, in *Leow Boke Chooi v. Asia Motor Co Ltd* [1967] 2 MLJ 109, judgment in default had been obtained against the defendant in default of his appearance before a sessions court. The summons could not be served personally on the defendant. The plaintiff had therefore obtained an order for substituted service which required posting copies of the summons and the statement of claim together with the order for substituted service on certain premises in Kuala Terengganu and on the notice board of the court house Kuala Lumpur. The cause papers were posted on the premises at Kuala Terengganu. But they had not been posted on the court's notice board. The sessions court dismissed the application by the defendant to set aside the judgment in default obtained against him. The defendant appealed. Gill J (as he then was) acting in the appellate civil jurisdiction held the judgment to be a nullity and set it aside. This is what he said (at p. 110 of the report):

> A point which appeared to have been overlooked by the learned president was that the order of substituted service had not been complied with in that no copies of the summons, the statement of claim and the order were posted on the notice board of the court house in Kuala Lumpur. The effect of such non-compliance with the order was that there had been no good and sufficient service on the defendant, so that the plaintiffs had obtained judgment against the defendant irregularly.
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> In *Anlaby & Ors. v. Praetorius* it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiae to have such judgment set aside. Fry LJ said in that case at page 769:

> There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief.

In *Craig v. Kanseen* it was held that the failure to serve the summons upon which the order in that case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.

For the reasons stated I allowed the appeal, setting aside the order of the learned president and substituting in its place an order that the ex parte judgment against the defendant be set aside.

So there it is. The order for sale in the present case falls plumb within the authorities we have mentioned. It is void. The learned judge was right. We therefore concluded that the respondent was entitled to have the order for sale set aside *ex debito justitiae.*

That brings us to the second ground of appeal. Learned counsel for the appellant submitted that the learned judge had erred in granting the first respondent's application because he (the first respondent) had been guilty of long and inordinate delay. Now, the learned judge was very much alive of the point. He referred to *Khor Cheng Wah v. Sungai Leasing Sdn Bhd* [1997] 1 CLJ 396, a judgment of this court. He however distinguished the facts of the present instant and accepted the explanation advanced by the first respondent for his delay in making his application.

This is a case in which there has not merely been a breach of a rule of court of mere technical significance. Here there was a breach of the rules of natural justice. The learned judge having accepted the explanation for the delay, the initial function of this court is one of review only. We do not have an original discretion to exercise. We have said so on numerous occasions. It is only when an appellant has been able to demonstrate a misdirection by the judge in whom the law reposes the original discretion that this court is entitled to intervene. We do not detect any such misdirection in the present case.

The first respondent told the judge that he was impecunious and could not therefore afford to engage counsel. The property which is the subject matter of the order for sale is a single storey terrace house in Bangsar. The judge knew that. He was therefore entitled to throw into the balance the fact the first respondent as the owner of such a modest piece of property would indeed have had great difficulty in finding money to engage counsel. He was therefore

entirely justified in accepting the first respondent's explanation. The result might have been quite different if the subject matter had been a mansion in Bukit Tunku and the chargor an affluent person.

There is one other matter we need to deal with. In the concluding paragraphs of his judgment, the learned judge made an order awarding damages to the respondents. We invited learned counsel for the first respondent to justify this. He was plainly unable to do so. Having retreated under pressure or argument, he frankly conceded that he could not take the benefit of such an order. Counsel was quite right in making the concession. There is no statutory backing for the order the learned judge made. The National Land Code does not sanction it.

For the reasons already given the appellants' appeal cannot succeed. The upshot is that the appeal is dismissed. But the order of the learned judge as to damages must be set aside. It is. The appellant is of course at liberty to commence fresh proceedings.

That brings us to the position of the second respondent who is the successful bidder at the auction at which the first respondent's property was sold under hammer. In our view the second respondent's legal position is very much connected with the appellant's right to give good title. The second respondent cannot be in a better position than the appellants. If the order for sale was void then all that followed in its wake was equally void. The point has already been concluded by high authority.

In *M & J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15, Wan Yahya SCJ when delivering the judgment of the Supreme Court said as follows:

> The order for sale confers on the chargee only the statutory rights to a judicial sale. A sale under s. 256 or s. 260 of the NLC is a judicial sale ordered by court on the application of the chargee. The chargor, who has until that stage not been divested of his proprietary rights, may intervene to set aside the sale in the event of fraud, impropriety or the breach of any statutory or contractual terms of the sale. We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. As the court's power to order the sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the terms or conditions must likewise be exercised.
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> We consider any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is *ultra vires* the authority to sell under the NLC. Therefore, we would, in answer to the second issue raised, say that as the

alteration of the completion date was made without giving notice to the chargor, the subsequent order made by the SAR was void as being *ultra vires* the NLC.

The last issue is basically on the authority of the court to cancel the name of the purchaser which had by then become indefeasible by subsequent registration. The registration under ch 4 of Pt XVIII of the NLC does not necessarily make the title of the land entirely unimpeachable. Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had – *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s. 340(3) of the NLC where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquired an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility – see *Gibbs v. Messer*. Under this principle, the registration of the insufficient or void instrument can be set aside.

In a later passage, His Lordship said:

We agree with what was stated in the judgments above. In our present appeal, failure to comply with the statutory requirements of paras (a) and (b) of s. 258 and para (c) of s. 261(1) of the NLC is not just a case of non-compliance with some practical guidelines in the NLC, a mere irregularity, but it is an illegality which strikes at the root of the proprietor's right to be heard.

The learned judge was therefore equally right in setting aside the order for sale against the second respondent. For these reasons we affirm the judgment appealed against. One final point. There is a cross appeal by the second respondent. It was not seriously canvassed. It is dismissed.

Having heard arguments on costs we are of the view that the appellant should pay costs of both respondents before us. Since the cross appeal came to nothing we would make no order as to costs on it.